IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-521

CONSUMER PRODUCT SAFETY COMMISSION, *et al.*,
Petitioners,

v.

GTE SYLVANIA, INC., *et al.*,
Respondents.

BRIEF FOR AMICUS CURIAE CONSUMER FEDERATION OF AMERICA

RICHARD A. LOWE
CLAUDIA SILVERMAN
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 624-8390
Attorneys for amicus curiae

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

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BRIEF FOR AMICUS CURIAE CONSUMER FEDERATION OF AMERICA

INTEREST OF AMICUS CURIAE

With the consent of all parties, Amicus Consumer Federation of America, Inc., ("CFA") files this brief. Amicus, a non-profit corporation incorporated in 1968 in the State of New York, is a federation of more than 220 state, local and national organizations, representing more than 30 million American consumers. The largest consumer organization in the United States, CFA seeks to represent the viewpoints and interests of consumers before Congress, regulatory agencies, and the courts.

CFA has been active in a variety of court and agency proceedings pertaining both to consumer product safety and the rights of the public under the Freedom of Information Act ("FOIA"), 5 U.S.C. §552. For example, CFA has participated in the development of Consumer Product Safety Commission ("CPSC" or "the Commission") regulations dealing with the reporting of consumer product safety hazards under section 15 of the Consumer Product Safety Act ("CPSA"), 15 U.S.C. §2064 and recordkeeping requirements for consumer product safety complaints under section 6(b)(1) of the CPSA, 15 U.S.C. §2055(b)(1) ("section 6(b)(1)"), the statutory provision at issue in this case.

Additionally, CFA has directed substantial efforts toward proper implementation of the FOIA. CFA has sought to maximize public access to information possessed by federal agencies and has appeared as *amicus curiae* in various FOIA cases.[1] More specifically, CFA participated as *amicus curiae* in both this case below and in a Second Circuit case in which the court adopted the position which CFA asserts herein, *Pierce & Stevens Chemical Corp. v. Consumer Product Safety Commission*, 585 F.2d 1382 (1978). Since this case involves the interpretation of consumer protection legislation which affects citizen access under the FOIA, it is of particular interest to CFA and its members.

[1] *E.g.*, Chrysler Corp. v. Brown, 441 U.S. 281 (1978); Consumers Union v. Heimann, 589 F.2d 531 (D.C. Cir. 1978); Westinghouse Electric Corp. v. Schlesinger, 542 F.2d 1190 (4th Cir. 1976), *cert. denied*, 431 U.S. 924 (1977); Parkridge Hospital, Inc. v. Blue Cross and Blue Shield of Tennessee, 430 F. Supp. 1093 (E.D. Tenn. 1977).

ISSUES DISCUSSED BY AMICUS

I. Whether Congress intended the requirements of §6(b)(1) of the Consumer Product Safety Act to encompass only the affirmative publication of information by the Commission, or also to replace the elaborate disclosure scheme already established by the Freedom of Information Act.

II. Whether §6(b)(1), which requires the Commission to take "reasonable steps" to assure the accuracy of information to be disclosed and that disclosure is "fair" and "reasonably related to effectuating the purposes" of the Consumer Product Safety Act, establishes the particularized substantive criteria necessary to qualify as a withholding statute within the meaning of Exemption 3 of the Freedom of Information Act.

STATEMENT OF THE CASE

This case is before the Court on writ of certiorari to the United States Court of Appeals for the Third Circuit on petition of the United States Consumer Product Safety Commission. It represents the consolidation of twelve suits which were originally filed during April and May of 1975 by respondent television manufacturers to enjoin the implementation of a final decision of the Commission reached on March 28, 1975. The decision was to release television-related accident data obtained from the manufacturers to Consumers Union of the United States, Inc., and Public Citizen Health Research Group, pursuant to a request under the Freedom of Information Act, 5 U.S.C. §552. The suits were consolidated in the United States District Court for the District of Delaware.

In October of 1975 the district court granted respondents' motion for preliminary injunctive relief, *GTE Sylvania, Inc. v. Consumer Product Safety Commission,* 404 F.Supp. 352 (D. Del. 1975), and two years later issued an order permanently enjoining the release of the data. *GTE Sylvania, Inc. v. Consumer Product Safety Commission,* 443 F.Supp. 1152 (D. Del. 1977). In so doing, the district court rejected the Commission's argument to the contrary and found that section 6(b)(1) of the CPSA applies to releases of information made by the Commission pursuant to FOIA requests, and that in this instance the Commission had not fulfilled the section's requirements. The district court also concluded that section 6(b)(1) was a withholding statute within the meaning of Exemption 3 of the FOIA, 5 U.S.C. §552(b)(3) ("Exemption 3").

The Court of Appeals for the Third Circuit affirmed the district court's decision, *GTE Sylvania, Inc. v. Consumer Product Safety Commission,* 598 F.2d 790 (3d Cir. 1979), declining to follow the ruling of the United States Court of Appeals for the Second Circuit in *Pierce & Stevens Chemical Corp. v. Consumer Product Safety Commission,* 585 F.2d 1382 (2d Cir. 1978), that section 6(b)(1) applied to Commission-generated disclosures, but not to disclosures made in response to FOIA requests. The Third Circuit also agreed with the district court's conclusion that section 6(b)(1) was a withholding statute within the meaning of Exemption 3.

SUMMARY OF ARGUMENT

The Freedom of Information Act is a broad disclosure statute enacted to ensure the prompt availability of records in the government's possession. Section 6(b)(1), on the other hand, establishes requirements that are in direct conflict with the procedural and substantive provisions of the Freedom of Information Act.

Neither the language of section 6(b)(1) nor its legislative history support the Third Circuit's interpretation that the time-consuming procedural requirements of section 6(b)(1) are applicable to the mere release of records requested under the FOIA. Instead, Congress intended section 6(b)(1) to be applicable only to the affirmative, official publication of information by the Commission. In this way, Congress protected manufacturers from Commission-initiated publicity, yet left the disclosure scheme of the FOIA undisturbed.

The court of appeals further erred in holding that section 6(b)(1) is a withholding statute within the scope of Exemption 3 of the FOIA. Congress, in amending Exemption 3 in 1976, set out specific standards of particularity which must be met by any non-disclosure statute in order to bar release of documents under the Freedom of Information Act. Because the steps required by section 6(b)(1) do not satisfy these standards, section 6(b)(1) does not qualify as an Exemption 3 statute.

Therefore, the circuit court erred in interpreting section 6(b)(1) as applicable to FOIA requests, and erroneously held that the Consumer Product Safety Commission's non-compliance with any of section 6(b)(1)'s requirements is sufficient to bar release of information requested under the FOIA.

ARGUMENT

I. SECTION 6(b)(1) OF THE CONSUMER PRODUCT SAFETY ACT DOES NOT APPLY TO RECORDS REQUESTED UNDER THE FREEDOM OF INFORMATION ACT.

A. Section 6(b)(1) Is Inconsistent with the FOIA.

The court of appeals determined that section 6(b)(1)is not limited to the affirmative publication of material by the Commission but is also applicable to records requested under the FOIA. However, not only is this interpretation unsupported by the terms of section 6(b)(1), but it is also inconsistent with the mandatory prompt disclosure requirements of the FOIA.

1. The FOIA Is A Broad Remedial Statute That Requires Prompt Disclosure to Requesters.

In enacting the FOIA, Congress re-evaluated the Nation's law and policy regarding public access to government-held information, and adopted a sweeping revision "whose basic purpose reflected 'a general philosophy of full agency disclosure.' " *Department of the Air Force v. Rose,* 425 U.S. 352, 360 (1976), *quoting* S. Rep. No. 89-814, 89th Cong., 1st Sess. 3 (1965). As this Court noted in *EPA v. Mink,* 410 U.S. 73, 80 (1973), the FOIA "seeks to permit access to official information long shielded unnecessarily from public view."

This legislation contains two features that are particularly crucial to its broad disclosure purpose. First, the FOIA requires disclosure of all agency records except those within the reach of one of the FOIA's nine exemptions. 5 U.S.C. §552(a)(3). Even where an exemption is applicable, however, the agency is free to voluntarily disclose the material requested. *Chrysler Corp. v. Brown,* 441 U.S. 281, ____, 99 S. Ct. 1705, 1713-14 (1979). The limited reach of the exemptions, and their permissive nature, are essential to the FOIA's disclosure policy.

Second, the FOIA contains a procedural framework designed to further the substantive goal of disclosure. Under the FOIA, each agency which receives a request for records must make "prompt" disclosure of all nonexempt documents, 5 U.S.C. §552(a)(3). *See* Pub. L. No. 90-23, 81 Stat. 54 (1967). And under the 1974 amendments to the FOIA, the agency must initially determine whether to comply with that request within ten working days, 5 U.S.C. §552(a)(6)(A)(i). *See* H.R. Rep. No. 93-876, 93d Cong., 2d Sess. 2 (1974). These provisions ensure that agencies may not delay the disclosure of records and thereby blunt the purpose and effect of the FOIA's mandatory disclosure requirement.

It is only against this backdrop of the FOIA's structure and purpose that the court of appeals' interpretation of section 6(b)(1) can be adequately assessed.

2. The Requirements of Section 6(b)(1) Are Inconsistent With The Mandatory Prompt Disclosure Scheme Of The FOIA.

Section 6(b)(1) generally provides that information obtained by the Commission under the CPSA, from which the identity of a manufacturer or private labeler may be readily ascertained, may not be publicly disclosed until the Commission completes certain steps. Specifically, section 6(b)(1) postpones any public disclosure of such information until the manufacturer or labeler is given 30

days notice and a reasonable opportunity to comment, and until the Commission takes "reasonable steps to assure" that the information is "accurate" and that disclosure would be "fair in the circumstances" and "reasonably related to effectuating the purposes" of the CPSA.[2]

The procedures required by section 6(b)(1) are invariably time-consuming. While requiring a minimum of 30 days, as a practical matter the pre-disclosure process is likely to extend far beyond that span of time. Even assuming the Commission had adequate staff, the independent Commission investigation entailed by the process of verification alone would inevitably result in lengthy delays beyond the specific time period for "prompt" disclosure required by the FOIA,[3] and could require a massive expenditure of scarce Commission resources. For example, in order for the Commission to disclose the content of a single consumer product safety complaint, it could be required to consider whether in fact a particular product caused an injury to a particular consumer, in the particular way alleged.[4] Given the complexities of consumer product failure, this would prove to be a major, if not impossible, task. Similarly, for extensive product studies, tests, or compilations of

[2]Section 6(b)(1) is set out in Appendix A.

[3]In this case the basic accident report data was compiled by the plaintiffs-manufacturers. Moreover, some of the information was more than five years old at the time it was requested, rendering the verification task even more difficult.

[4]Unfortunately, the court of appeals chose not to evaluate the impact of its interpretation of §6(b)(1) on the Commission's ability to carry out the section's requirements. Rather, the court facilely avoided such difficulties by concluding that section 6(b)(1) is a witholding statute. See p. 22, *infra*.

safety data, reasonable assurances of accuracy would require inestimable Commission staff, time and energies.[5]

Furthermore, inasmuch as section 6(b)(1) sets no maximum time limit for Commission investigations, it does not prevent or even discourage lengthy investigations. In order to prevent court challenges alleging that the Commission failed to take "reasonable steps" to determine the accuracy of information, the Commission might well be encouraged to undertake unnecessarily careful and lengthy investigations prior to the disclosure of information.[6]

The delay and uncertainty inherent in section 6(b)(1)'s operation would effectively eviscerate the FOIA's fundamental emphasis on mandatory prompt disclosure, with the result of severely limited public access to records produced or received by the Commission and, consequently, little opportunity for public insight into its activities.

Indeed, the Second Circuit in its recent ruling upholding the Commission's position that the requirements of section 6(b)(1) are not applicable to requests under the FOIA, noted precisely these inconsistencies

[5]Typical of the difficulties involved are those posed by the following hypothetical: the Commission retains a technical consultant to prepare a report considering the potential hazard posed by a particular consumer product. What is the Commission obligated to do under §6(b)(1) if the consultant's report is requested under the FOIA? Is the Commission required to study the technical soundness of the study it originally requested? Should it commission another study to evaluate the accuracy of the first study? It is difficult to believe Congress intended such absurd results.

[6]Indeed, in light of the effort involved in fulfilling §6(b)(1)'s requirements, Commission staff might be anxious to find ways to avoid disclosure, such as giving an excessively broad reading to the FOIA's exemptions.

between the two statutes. *Pierce & Stevens Chemical Corp. v. Consumer Product Safety Commission,* 585 F.2d 1382, 1387-88 (1978). That court stated:

> [The FOIA] calls for prompt disclosure of all non-exempt documents, notably short administrative deadlines and unusually speedy court procedures; e.g., a case under the FOIA shall "take precedence" and be "expedited in every way." In contrast, the procedures of 6(b)(1) consume at least 30 days and probably a much longer period before "public disclosure" occurs. Moreover, if the Commission must take "reasonably steps to assure" the accuracy of all information in a record to be disclosed, this would require independent investigation of information received, as here, from another agency some eight years before. Clearly this would involve long delays inconsistent with the purpose of the FOIA.

Id. at 1387-88.

3. The Requirements of Section 6(b)(1) Are Inconsistent With The FOIA's Requirement To Release Existing, Not Newly-Created Records.

The Freedom of Information Act requires only the release of existing agency records; the agency is not required to create explanatory material. *NLRB v. Sears, Roebuck & Co.,* 421 U.S. 132, 161-62 (1975). Yet section 6(b)(1) requires the Commission to take "reasonable steps" prior to the public disclosure of material to assure accuracy of the documents to be disclosed. Such steps obviously contemplate rewriting of certain material where necessary, as the court below acknowledged, 598 F.2d at 804, and as noted by the Second Circuit in

Pierce & Stevens Chemical Corp. v. Consumer Product Safety Commission, 585 F.2d at 1388. But the basic principle underlying the FOIA is that the public has a right to know information upon which the government relies in making decisions, regardless of the accuracy of that information. Indeed, accuracy is a subjective term, and the members of the public, as well as government, should have an opportunity to determine the relative accuracy of material in the government's possession.

4. The Requirements Of Section 6(b)(1) Conflict With The Requirement That Under The FOIA, Documents Must Be Released To "Any Person".

The FOIA requires that documents released under its authority must be released to "any person". It "precludes consideration of the interests of the party" seeking release. *Soucie v. David,* 448 F.2d 1067, 1077 (D.C. Cir. 1971). *See also, NLRB v. Sears, Roebuck & Co.,* 421 U.S. 132, 143 n.10 (1975). Congress noted when it passed the Act nearly 15 years ago that one of the intended effects of the FOIA is to eliminate "the 'properly and directly concerned' test of who shall have access to public records. . . ." H.R. Rep. No. 1497, 89th Cong., 2d Sess. 1 (1966).

The requirement of section 6(b)(1) that the Commission releases documents only after it has determined that release of the information is "fair in the circumstances and reasonably related to effectuating the purposes of the Act" is wholly at odds with Congress' indisputable intent that access to government records should not depend upon the requester's interest in the documents. Any analysis of the fairness of release or the purposes to be served by the release of documents to a particular re-

quester entails scrutiny of the identity of the requester and the requester's intended use of the information. Whether records are sought by an academic, a consumer, or a large corporation, the mandate of the FOIA is disclosure.

Moreover, the consideration of whether release of information would be "fair in the circumstances" could be used as a shield against public scrutiny of CPSC decisions. For example, a decision not to release files of an aborted investigation into the safety of a certain consumer product might easily be guarded from the public eye by a determination that release would not be "fair in the circumstances."[7] Such a determination would unfortunately serve to protect not only the manufacturer involved but the basis for the Commission's decision, as well.

In summary, section 6(b)(1)'s procedures are clearly at odds with the essential disclosure scheme of the FOIA, carefully crafted and thoroughly deliberated by Congress, which requires prompt disclosure of existing documents. If the Third Circuit's reading is to be accepted, this Court must conclude that Congress intended to repeal by implication the explicit requirements of the FOIA, where requesters seek information from the Commission. As discussed below, such a reading is unwarranted, and contrary to a fair reading of the statute and its relevant legislative history.

[7]Once information is the subject of an administrative or judicial proceeding under the CPSA, the procedures of §6(b)(1) do not apply. Section 6(b)(2), 15 U.S.C. §2055(b)(2). But information obtained under the CPSA about which the Commission takes no action remains subject to §6(b)(1). Therefore, if §6(b)(1) applied to FOIA requests, information concerning Commission proceedings could be disclosed, but the information relating to the failure of the Commission to institute appropriate actions could not be brought promptly to light using the FOIA.

B. Both The Language And The Legislative History Of Section 6(b)(1) Indicate Congress' Intent To Limit The Section To The Publication Of Information Initiated By The Commission.

The court below concluded that Congress intended section 6(b)(1) to apply to disclosures of information under the Freedom of Information Act as well as to affirmative, official releases, news conferences, and publication of reports. 598 F.2d at 811. But neither the language of section 6(b)(1) nor its legislative history supports the Third Circuit's application of section 6(b)(1) to FOIA requests. A careful analysis reveals no congressional intent to undermine the procedural and substantive framework of the FOIA with respect to consumer product safety information. Rather, both the language and the legislative history of section 6(b)(1) indicate Congress' intent to apply that provision's procedures only to the affirmative publication of information by the Commission.[8] By giving section 6(b)(1) this limited reach, Congress avoided doing violence to its overriding policy of prompt disclosure under the FOIA.

Section 6(b)(1) makes repeated reference to the "public disclosure" of information by the Commission. We submit that, by using the word "public", Congress meant something more than mere disclosure, particularly when considered in light of the FOIA, which requires the release of information upon request. This conclusion is borne out by the contrast between section 6(a)(2)'s ban on the "disclosure" of trade secrets and other con-

[8]Illustrative of this intended reach is Relco, Inc. v. Consumer Product Safety Commission, 391 F. Supp. 841 (S.D. Tex. 1975), where §6(b)(1) was triggered when the Commission issued a press release and "censored" a product.

fidential business information, and the "public disclosure" language of section 6(b)(1). Section 6(a)(2) is clearly applicable to FOIA requests and broadly applies to *all* disclosures.[9] It would indeed be anomalous for Congress, in the same section of the CPSA, to utilize different terminology if it intended the same reach in sections 6(a)(2) and 6(b)(1).[10]

Similarly, section 6(b)(1) requires that if the Commission improperly "publicly" discloses inaccurate or misleading information, the Commission "shall, *in a manner similar* to that in which [the original] disclosure was made, *publish* a retraction." (emphasis supplied). As it is virtually impossible to "publish" a retraction in a manner similar to the release of records under the FOIA, this is further indication that Congress did not contemplate the application of section 6(b)(1)'s requirements to FOIA requests.[11] The Second Circuit in *Pierce & Stevens,* 585 F.2d at 1387, recognized this inconsistency, noting that "[t]his language seems to envision agency-initiated publicity, via press release or otherwise, rather than a mere request for a document under the FOIA." Yet the Third Circuit dismissed this argument with the assertion that the Commission could "conceivably . . . 'publish a retraction' in a similar manner by releasing correcting information to the same FOIA requesters who had received the earlier inaccurate material." Of course the Commission could inform the requesters of inaccuracies, but this would hardly amount to "publication" of a retraction.

[9]Section 6(a)(2)'s absolute prohibition against disclosure qualifies it as a "withholding" statute within the meaning of Exemption 3 of the FOIA.

[10]Otherwise the word "public" serves no purpose. It is a well recognized rule of statutory construction that the words of statutes are to be given effect and not to be construed as surplusage. *See, e.g.,* Klein v. Republic Steel Corp., 435 F.2d 762, 766 (3d Cir. 1970). "[W]ords in statutes should not be discarded as 'meaningless' and 'surplusage' when Congress specifically included them, particularly where the words are excluded in other sections of the same act." United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972).

[11]*See also* H.R. Rep. No. 92-1153, 92d Cong., 2d Sess. 32 (1972).

Therefore, from the face of the statute, it is clear that Congress intended section 6(b)(1) to have a limited reach, to accomplish a limited purpose.[12] This intent becomes even more obvious upon an examination of section 6(b)(1)'s legislative history.

Although the contemporaneous legislative history of section 6(b)(1) is sparse, it nonetheless provides sufficient evidence to determine the legislative intent behind its enactment. Congress feared the Commission might affirmatively publicize product safety information which was unfair or inaccurate, and thereby damage the reputations of consumer products' manufacturers, and labelers.[13] Such a concern is understandable and, we submit, it is to this dissemination of adverse publicity, as an extension of the Commission's enforcement mechanism, that Congress sought to attach particular protections.[14]

[12]This reading is buttressed by §6(b)(1)'s requirements that the Commission take reasonable steps to assure the fairness of public disclosure and its reasonable relationship to effectuating the purpose of the CPSA. Such considerations are relevant to a Commission decision to initiate disclosure but, without more, seem out of place with respect to the request for material under the FOIA.

[13]Part of the Commission's function is to "*disseminate* injury data, and information, relating to the causes . . . of death, injury, and illness associated with consumer products." 15 U.S.C. §2054(a)(1) (emphasis added).

[14]*Relco, supra,* is a classic illustration.*See also,* H.R. Rep. No. 92-1153, 92d Cong., 2d Sess. 31-32 (1972). During the debate on the Consumer Product Safety Act, Congressman Crane recalled the Federal Trade Commission's erroneous and damaging public condemnation of a Zerex commercial.

(footnote continued)

The harm associated with the disclosure of inaccurate or unfair consumer product safety information can be significant where the Commission places it imprimatur on the material by initiating its publication. Absent the Commission's affirmation of the information, however, the weight of the Commission's authority simply is not introduced into the marketplace.

This interpretation is bolstered by other aspects of the contemporaneous legislative history. The House Report accompanying a version of the bill which includes section 6(b)(1) made numerous references to the Commission "disseminating" information. *See* H.R. Rep. No. 92-1153, 92d Cong., 2d Sess. 32 (1972). The use of this term implies that the House Committee, which drafted the version of section 6(b)(1) which eventually became law, was concerned with affirmative Commission disclosures, rather than responses to FOIA requests. Releasing information to an FOIA requester cannot ac-

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(*footnote continued*)

> What the FTC did was to call a press conference in November 1970 and make a "proposed complaint" against Du Pont, alleging, without proof, that the television commercial was misleading, that the antifreeze actually damaged automotive cooling systems, and that it had been inadequately tested. The Federal Agency then publicly threatened to ban the product.
>
> Officials at Du Pont were not even informed of the FTC's action before the Washington press conference.
>
> * * *
>
> Equally important is the fact that the FTC turned out to be wrong. It dropped the charge. . . that the product could cause damage. The FTC, in fact, found nothing wrong with the product in any way.
>
> The financial damage had, of course, already been done. 118 Cong. Rec. 31389 (September 20, 1972).

curately be described as "disseminating" that information.[15]

Perhaps the most telling aspect of the legislative history is its very failure to indicate that Congress intended section 6(b)(1) to cover requests made under the FOIA. Only a few years before passage of the CPSA, Congress enacted a carefully developed procedural and substantive scheme for guaranteeing public access to information in the hands of government officials.

It is inconceivable that Congress could have intended to nullify the application of that scheme to information in the hands of the Consumer Product Safety Commission, an agency which Congress expressly charged with "assist[ing] consumers in evaluating the comparative safety of consumer products." 15 U.S.C. §2051(b)(2). Yet the opinion of the court of appeals implies that Congress, without a word of explanation, and through the use of language not fitting the individualized release to an FOIA requester, made just such a wholesale exception to its mandate of prompt disclosure. We submit that such an interpretation of section 6(b)(1) is erroneous.

Furthermore, the Third Circuit's analysis of the legislative history of the section is faulty, relying on inconclusive fragments of statements and reports to reach its mistaken conclusion as to Congress' intent. For example, the court relied on a statement by the Department of Health, Education, and Welfare merely

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[15] "Disseminate" is defined in Webster's Third New International Dictionary (unabridged ed.) as "to spread or send out freely or widely . . . make widespread . . . to foster general knowledge of: broadcast, publicize . . . ."

paraphrasing[16] the provisions of an earlier version[17] of section 6. The statement shed absolutely no light on the proper interpretation of the version of the bill under discussion, and certainly provided no insight whatsoever into the proper interpretation of the provision eventually enacted. Similarly, the court relied on the fact that the House Committee on Interstate and Foreign Commerce "made no distinction between those aspects of section 6 expressly governing FOIA requests and the provisions of section 6(b)(1)." But the fact that the Committee made no express reference to the distinction does not indicate that the Committee had an understanding that section 6(b)(1) should apply to FOIA requests. To the contrary, throughout the passage relied on by the court, the Committee spoke of the requirements of section 6(b)(1) as it applies to information "disseminated" by the Commission, a term which clearly implies broader disclosure than the release to a single requester under the FOIA.[18]

Moreover, any doubt as to the proper interpretation of section 6(b)(1) should be removed after consideration of that section's subsequent legislative history. In 1976, section 29(e) of the CPSA, 15 U.S.C. §2078(e), was amended to prohibit any agency that received accident and investigation reports from the Commission from releasing such information unless the Commission com-

[16]The statement read, in part: "Section 4(c) [now section 6] would also require the provision of thirty days notice to the manufacturer of any consumer product prior to the Secretary's public disclosure of information respecting that product, if such information would reveal the manufacturer's identity." Consumer Product Safety Act: Hearings Before the Subcommittee on Commerce and Finance of the Committee on Interstate and Foreign Commerce, 92d Cong., 1st Sess., 188 (1971-1972), *cited in GTE*, 598 F.2d at 807.

[17]That version was section 4(c) of H.R. 8110, 92d Cong., 1st Sess. (1972).

[18]See n. 15. *supra.*

plied with section 6(b)(1).[19] The Conference Report, in discussing this amendment, stated:

> The requirement that the Commission comply with section 6(b) prior to another Federal agency's public disclosure of information obtained under the Act is not intended by the conferees to supersede or conflict with the requirements of the Freedom of Information Act, 5 U.S.C. §552(a)(3) and (a)(6). *The former relates to public disclosure initiated by the Federal agency while the latter relates to disclosure initiated by a specific request from a member of the public under the Freedom of Information Act.* H.R. Rep. No. 1022, 94th Cong., 2d Sess., 27 (1976) (emphasis added).

This subsequent legislative history clearly confirms the congressional intent, as determined from the face of the statute and the prior legislative history, and is consistent with the purposes and intent of the FOIA. Under circumstances such as these, this Court has indicated that subsequent expressions of congressional intent are "entitled to great weight in statutory construction." *Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367, 381 (1969); *Glidden Co. v. Zdanok*, 370 U.S. 530, 541-42 (1962); *Fedeal Housing Administration v. The Darlington, Inc.*, 358 U.S. 84, 90 (1958); *Mount Sinai Hospital of Greater Miami, Inc. v. Weinberger*, 517 F.2d 329, 343 (5th Cir. 1975), *cert. denied sub nom. Mt. Sinai Hospital of Greater Miami, Inc. v. Mathews*, 425 U.S. 935 (1976).

The Third Circuit was "unwilling to accept" this clear indication of congressional intent, believing it to be an

[19]Consumer Product Safety Commission Improvements Act of 1976, Pub. L. No. 94-284, §15, 90 Stat. 510 (1976).

"isolated" and "erroneous" conclusion of a later congressional committee. *GTE,* 598 F.2d at 811. But the cases cited by the court merely hold that subsequent legislative history may be of little value in inferring the Congress' prior intent where the subsequent legislative history is not a clear statement of intent or where it conflicts with the "plain congressional purpose" as expressed in the prior legislative history. *United States v. Philadelphia National Bank,* 374 U.S. 321 (1963); *United States v. Price,* 361 U.S. 304 (1960). However, in this case the subsequent legislative history is clear and consistent with the prior legislative history.

In short, a careful analysis of the language of section 6(b) (1) and its complete legislative history reveals that Congress did not intend to apply section 6(b)(1)'s procedures to requestes under the FOIA. Moreover, to interpret section 6(b)(1) otherwise would do violence to the FOIA's requirement of prompt disclosure, and attribute to Congress a *sub silentio* repeal of the FOIA with respect to consumer product safety information.

II. SECTION 6(b)(1) OF THE CONSUMER PRODUCT SAFETY ACT DOES NOT ESTABLISH PARTICULAR NON-DISCLOSURE CRITERIA AS REQUIRED BY EXEMPTION 3 OF THE FOIA.

As this Court has recognized, the Freedom of Information Act is broadly conceived and is intended to permit public access to information unnecessarily shielded from public scrutiny. "It . . . attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands." *EPA v. Mink,* 410 U.S. 73, 80 (1973). Thus "disclosure, not secrecy, is the dominant objective of the Act," and the nine exemptions from mandatory disclosure set forth in

the FOIA, 5 U.S.C. §552(b)(1)-(9), "are explicitly made exclusive . . . and must be narrowly construed." *Department of the Air Force v. Rose,* 425 U.S. 352, 361 (1976).

The third exemption to the FOIA, 5 U.S.C. §552(b)(3) permits agencies to withhold from public disclosure materials covered by a limited and narrow class of substantive statutes. In its original form, Exemption 3 was limited to matters "specifically exempted from disclosure by statute." 5 U.S.C. §552(b)(3) (1970) (amended 1976). However, Congress amended Exemption 3 in 1976 expressly to overrule the Court's decision in *Administrator, FAA v. Robertson,* 422 U.S. 255 (1975). *Robertson* held that Exemption 3 included those statutes vesting in agency officials wide discretion to withhold matters requested pursuant to the FOIA.[20] In overruling *Robertson,* Congress left no doubt as to the narrow scope of Exemption 3. The House Report, explaining the amendment stated:

> Believing that the decision misconceives the intent of exemption (3), the committee recommends that the exemption be amended to exempt only material required to be withheld from the public by any statute establishing particular criteria or referring to particular types of information. The commitee is of the opinion that this change would eliminate the gap created in the Freedom of Information Act by the *Robertson* case without in any way endangering statutes such as the Atomic Energy Act of 1954, 42 U.S.C. §§2161-66, which pro-

[20]The statute in *Robertson* allowed the withholding of information where disclosure was not "required in the interest of the public". 49 U.S.C. § 1504.

> vides explicity for the protection of certain nuclear data.
>
> H.R. Rep. No. 94-880, 94th Cong., 2d Sess. 23, *reprinted in* [1976] U.S. Code Cong. & Ad. News at 2205.

Thus, in its current form, Exemption 3 is applicable only to those matters:

> specifically exempted from disclosure by statute (other than section 552(b) of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld. 5 U.S.C. §552(b)(3).

The Third Circuit, in an attempt to reconcile the irreconcilable,[21] concluded that ". . . the perceived inconsistencies between section 6(b)(1) and the FOIA will be minimized if the former provision is, in fact, a withholding statute within the meaning of Exemption 3, granting the Commission the discretion not to disclose material subject to its provisions." *GTE*, 598 F.2d at 813.

The problem with this approach is not only that it fails to minimize the inconsistencies between the two statutes[22] but that Congress did not include "minimization of inconsistencies" as a basis for findings that a statute falls within the ambit of Exemption 3. Like the proverbial square peg in a round hole, section 6(b)(1) does not fit within the congressionally mandated scope of Exemption 3.

[21]See Argument, *supra* at 13.

[22]The scenario offered by the court of appeals at 598 F.2d 812-13, for the Commission's handling of FOIA requests if section 6(b)(1) is a withholding statute is unworkable. The Court speaks of materials which the Commision could easily determine to obviously portray a factual situation inaccurately. Indeed, it is doubtful that among the thousands of consumer letters referring to accidents which the manufacturers in this case turned over to the Commission, even five

(footnote continued)

Section 6(b)(1) does not meet even the threshold requirement of Exemption 3 for it clearly does not specifically exempt information from disclosure. To the contrary, the section authorizes disclosure and provides only that certain steps be taken by the Commission prior to disclosing information to the public. Such steps, far from contemplaitng withholding, are clearly procedural prescriptions to the Commission which, in preparation for any intended disclosure, the Commission is required to carry out. *Cf. Mobil Oil Corp. v. FTC*, 406 F. Supp. 305 (S.D.N.Y. 1976) (statute authorizing disclosure does not forbid disclosure) *Id.* at 310. Yet, the Third Circuit

(footnote continued)

percent could be labeled obviously inaccurate on their face. Only a complaint as outrageous as the statement "my television bit me on the arm" would enable the Commission staff to easily conclude that the description was "obviously inaccurate." Under the Third Circuit's scenario, nearly every one of the accident reports sought by the requesters in this case would have to be investigated by the Commission.

Equally absurd is the court's assertion that the Commission "could inform the requester that release would be forthcoming pending 30 days notice to the manufacturers identified in that material." This, however, is not the end of the process. It simply shifts the review to the manufacturers to determine whether or not they will agree that the actions of the Commission indeed amounted to reasonable steps to assure accuracy, fairness and achieving the purposes of the CPSA. If they disagreed, of course, they could initiate litigation which could extend the 30 days indefinitely.

Where the disclosure is of Commission-generated information the situation is obviously different. The Commission is free to select the materials it wishes to release and the context in which it wishes to make the release.

upheld the district court's determination that section 6(b)(1) was a withholding statute under Exemption 3.

Even if section 6(b)(1) specifically exempts material from disclosure, as it does not, it fails to establish particular criteria for withholding, as required by subsection (B) of Exemption 3.[23] Nevertheless, the district court concluded, and the court of appeals agreed, that the following language established the particular criteria for withholding:[24]

> The Commission shall take *reasonable steps to assure,* prior to its public disclosure . . . *that information* from which the identity of [a] manufacturer or private labeler may be readily ascertained *is accurate,* and that such *disclosure is fair in the circumstances* and *reasonably related to effectuating the purposes* of this chapter. (emphasis added). 15 U.S.C. §2055(b)(1).

Without attempting any serious analysis of subsection (B) of Exemption 3 in relationship to section 6(b)(1), the Third Circuit endorsed the erroneous conclusion of the district court that a statute establishing such vague requirements as does section 6(b)(1) satisfies Congress'

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[23]It is plain that §6(b)(1) does not flatly ban disclosure under subsection 3(A). Neither the district court nor the court of appeals decided whether §6(b)(1) satisfied the "particular types of matters" requirement of subsection (B), but clearly it does not.

[24]The court of appeals stated:

> The district court found that section 6(b)(1), in requiring the Commission to take reasonable steps to assure accuracy, fairness, and the service of a statutory purpose prior to disclosing information identifying individual manufacturers, established particular criteria for withholding within the meaning of Exemption 3. *GTE,* 598 F.2d at 813.

detailed and narrow standard. The Third Circuit's decision in this case brings us full circle to the Court's holding in *Robertson.* For what the decision does is to allow this Commission and all other agencies with similarly vague, subjective, and therefore highly discretionary statutes, to deny the public its right to information from possibly unwilling officials. *Cf. Mink,* 410 U.S. at 80. Given the 1976 Amendments to Exemption 3, that is clearly not what Congress intended.

Examples of statutes that could justify withholding under the amended Exemption 3 emphasize this point. Sections 706(b) and 709(e) of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e-5(b), 2000e-8(e); section 314(a)(3) of the Federal Election Campaign Act, 2 U.S.C. §437(g)(a)(3) and section 801 of the Federal Aviation Act of 1958, 49 U.S.C. §1461, are cited as examples in the House Report.[25]

The common thread throughout these statutes is the clear command they convey and the exact standards they establish. Section 706(b) of the Civil Rights Act of 1964, as amended, in relevant part states:

> *Charges* shall not be made public by the Commission. . . . Nothing said or done during and as a part of such *informal* [conciliation] endeavors may be made public by the *Commission, its officers or employees* . . . without the written consent of the *persons* concerned. (Emphasis in original).

Section 709(e) of the same Act likewise states:

> It shall be unlawful for any officer or employee of the Commission to make public in any man-

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[25]H.R. Rep. No. 880, 94th Cong., 2d Sess. 23 (1976), *reprinted in* [1976] U.S. Code Cong. & Ad. News at 2205.

> ner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this title involving such information.

The other examples are also clear in their commands and establish precise standards for withholding information. Section 314(a)(3) of the Federal Election Campaign Act states:

> Any notification of investigation . . . shall not be made public by the Commission or by any person without the written consent of the person receiving such notification or the person with respect to whom such investigation is made.

And, section 801 of the Federal Aviation Act of 1958 states "any order of the Board . . . shall be submitted to the President before publication thereof."

Compared to these statutes that were explicitly isolated as examples of statutes intended to be covered by Exemption 3, section 6(b)(1) is unmistakably not cast in the same mold. They state clear, precise, objective criteria for determining when to disclose information. Section 6(b)(1), on the other hand, does not. None of its requirements convey the objective standards as do the examples quoted above.

If nothing else, the labored development of our tort law has amply demonstrated that there is a wide spectrum of "reasonable" behaviors. A reasonable man test hardly serves as a precise vehicle to transmit to the Commission the congressional will with respect to product safety disclosure decisions. On the contrary, this amorphous requirement infects each of section 6(b)(1)'s

three standards with the imprecision the 1976 amendment sought to eliminate.

Similarly, the criterion "reasonably related to effectuating the purpose of this Act" is nearly beyond measure. The Consumer Product Safety Act's purposes are: (1) to protect the public against unreasonable risks of injury associated with consumer products; (2) to assist consumers in evaluating the comparative safety of consumer products; (3) to develop uniform safety standards for consumer products and to minimize conflicting State and local regulations; and (4) to promote research and investigation into the causes and prevention of product-related deaths, illnesses, and injuries. 15 U.S.C. §2051(b). If every disclosure request under the FOIA must first be subjected to a Commission determination that it is reasonably related to achieving the purposes of the CPSA, then obviously the 1976 Amendments to Exemption 3 were unnecessary.

The case law relied upon by the court of appeals also fails to offer any support for its conclusion; instead, the cases further highlight the errors in its reasoning. *American Jewish Congress v. Kreps*, 574 F.2d 624, 628-29 (D.C. Cir. 1978), which the Third Circuit relied upon to support its conclusion states:

> Nondisclosure is countenanced by subsection (B) if, but only if, the enactment is the product of congressional appreciation of the dangers inherent in airing particular data and *incorporates a formula whereby the administrator may determine precisely whether disclosure in any instance would pose the hazard that Congress foresaw.* But section 6(b)(1)'s language does not provide "a formula whereby the [Commission] may determine precisely"

> whether to disclose. Indeed, it does the opposite. It provides the Commission with *carte blanche* to determine if its steps are "reasonable", if its action would be "fair in the circumstances", and "reasonably related to effectuating the purposes of the [Act]".[26]

Similarly, the Ninth Circuit in *Lee Pharmaceuticals v. Kreps*, 577 F.2d 610 (9th Cir. 1978), while applying what the Third Circuit referred to as its own pre-*Robertson* reasoning, concluded that 35 U.S.C. §122 "provides for non-disclosure of particular types of matters, patent applications, thus falling squarely within provision (B) of Exemption 3." *Id.* at 616. Unlike section 6(b)(1), however, the statute in *Lee Pharmaceuticals* stated with unmistakable clarity Congress' intent that certain matters not be made public.[27]

Thus, as we have demonstrated above, the court of appeals erred in determining that Congress intended the procedural requirements of section 6(b)(1) of the Consumer Product Safety Act to be applicable to requests for information under the FOIA. Rather, application of the section is limited to Commission-generated

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[26]We disagree with the court of appeals' view of the hazard Congress intended to eliminate by section 6(b)(1). As we show above, the hazard was that of Commission-generated adverse publicity, not the use of materials received by a requester under the FOIA. Regardless of the use, the latter simply never bears the official imprimatur of government condemnation, while the former clearly does.

[27]35 U.S.C. §122 provides:

> Applications for patents shall be kept in confidence by the Patent Office and no information concerning the same given without authority of the applicant or owner unless necessary to carry out the provisions of any Act of Congress or in such special circumstances as may be determined by the Commission.

ERRATUM

The passage on pp 27-28 should read as follows:

> Nondisclosure is countenanced by subsection (B) if, but only if, the enactment is the product of congressional appreciation of the dangers inherent in airing particular data and incorporates a formula whereby the administrator may determine precisely whether disclosure in any instance would pose the hazard that Congress foresaw. (emphasis added).

But section 6(b)(1)'s language does not provide "a formula whereby the [Commission] may determine precisely" whether to disclose. Indeed, it does the opposite. It provides the Commission with carte blanche to determine if its steps are "reasonable", if its action would be "fair in the circumstances" and "reasonably related to effectuating the purposes of the [Act]".[26]/

disclosures, the only type likely to cause the harm Congress intended to avoid. The court also erred in holding that section 6(b)(1) meets the stringent requirements of the amended Exemption 3 of the FOIA.

CONCLUSION

For the foregoing reasons, the Third Circuit's conclusions that section 6(b)(1) is applicable to FOIA requests and that the section falls within Exemption 3(B) are erroneous and therefore should be reversed.

Respectfully submitted,

RICHARD A. LOWE
CLAUDIA SILVERMAN
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 624-8390

Attorneys for Amicus Consumer Federation of America*

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*This brief was prepared with the assistance of Leopoldo A. Ochoa, a third year student at the Georgetown University Law Center.

APPENDIX

Section 6(b)(1) of the Consumer Product Safety Act, 15 U.S.C. §2055(b)(1), provides:

> Except as provided by paragraph (2) of this subsection, not less than 30 days prior to its public disclosure of any information obtained under this Act, or to be disclosed to the public in connection therewith (unless the Commission finds out that the public health and safety requires a lesser period of notice), the Commission shall, to the extent practicable, notify, and provide a summary of the information to, each manufacturer or private labeler of any consumer product to which such information pertains, if the manner in which such consumer product is to be designated or described in such information will permit the public to ascertain readily the identity of such manufacturer or private labeler, and shall provide such manufacturer or private labeler with a reasonable opportunity to submit comments to the Commission in regard to such information. The Commission shall take reasonable steps to assure, prior to its public disclosure thereof, that information from which the identity of such manufacturer or private labeler may be readily ascertained is accurate, and that such disclosure is fair in the circumstances and reasonably related to effectuating the purposes of this Act. If the Commission finds that in the administration of this Act, it has made public disclosure of inaccurate or misleading information which reflects adversely upon the safety of any consumer product, or the practices of any manufacturer, private labeler, distributor, or

retailer of consumer products, it shall, in a manner similar to that in which such disclosure was made, publish a retraction of such inaccurate or misleading information.